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| 2    | 1   |            | CTICES APPEALS BOARD SHINGTON                 |
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| 4    | DAVID A. MACBRYER                                   | )          |   |
| 5    | Appellant,  | )          | FPAB NO. 94-20                                |
| 6    |   | )          | FINAL FINIDINGS OF FACT                       |
| 7    | <b>v.</b>   | )          | FINAL FINDINGS OF FACT,<br>CONCLUSIONS OF LAW |
| •    | STATE OF WASHINGTON,                                | )          | AND ORDER                                     |
| 8    | DEPARTMENT OF NATURAL                               | )          |   |
| 9    | RESOURCES   | )          |   |
| J    |   | )          |   |
| 10   | Respondent,   | )          |   |
| 11   |   |            |   |
|      | I   |            |   |
| 12   | This matter came on before the F                    | Ionorable  | William A Harrison, Administrative            |
| 13   | Appeals Judge, presiding, and Board Me              | ember Ro   | bert A. Quoidbach                             |
| 14   | The matter is an appeal from a S                    | 2,000 civ  | il penalty for allegedly conducting forest    |
| 15 i | practices without an approved application           | n.         |   |
| 16   | Appearances were as follows.                        |            |   |
| 17   | David A. MacBryer, represer                         | iting hims | self.   |
| 18   | 2 John E Justice, Assistant Att                     | orney Ger  | neral, for the Washington State Department    |
| 19   | of Natural Resources                                |            |   |
| 20   | The hearing was conducted at the                    | John A.    | Cherberg Building on September 20, 1994       |
| 21   | Gene Barker & Associates, Olympia, pro              | ovided co  | urt reporting services                        |
| 22   | Witnesses were sworn and testific                   | ed. Exhil  | oits were examined. From testimony heard      |
| 23   | and exhibits examined, the Forest Practi            | ces Anne   | als Board makes these                         |
| 24   | and exhibits examined, the rolest reach             | ces Appe   | as board makes these                          |
| 25   |   |            |   |
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| 27   | FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDE | l<br>ER    |   |

CONCLUSIONS OF LAW AND ORDER

FPAB NO 94-20

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## FINDINGS OF FACT

I

This matter arises in Snohomish County. Appellant, David A. MacBryer, is an experienced logging operator who was engaged by a landowner, Hadley, to harvest timber

II

After obtaining a forest practices approval from the Department of Natural Resources (DNR), appellant harvested a considerable area within the Hadley ownership. That done, appellant then submitted another application to DNR for a parcel of 7 acres elsewhere on Hadley land. That application shows the 7 acres to be east and up slope from a creek. The application also proposed a haul road to cross the creek.

Ш

The appellant's 7 acre application was classified as Type III (priority) with a notation of unstable soils. In July, 1993, the application was marked "Disapproved" and returned to the appellant. The DNR also placed the following on the disapproved application

"Disapproved due to incomplete road information. Please supply detailed road location plan with bridge site information."

IΥ

Appellant did not supply a detailed road location plan with bridge site information.

Rather, a meeting was held on the site between the appellant and the DNR forester. This was in September, 1993. After the oral discussion of stream crossing methods which ensued, the

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appellant believed that a solution had been reached. The appellant assumed that DNR would issue a forest practices approval based upon that oral conversation. The DNR forester assumed that appellant would re-apply for the 7-acre cut, in writing, using concepts agreed to on the ground.

V

Without submitting any further application, the appellant began harvesting in December, 1993. Tree falling in that month was followed by removal of the fallen logs through January, 1994. The area harvested was close to, but different from, the 7 acre area previously disapproved. Essentially, the harvest was west of the creek, partly on Hadley land and partly (in trespass) onto an adjacent ownership. In all, approximately 30 mbf was harvested.

VI

The DNR then cited appellant for harvesting without a forest practices permit, and assessed a civil penalty of \$2000 for the events of December, 1993-January, 1994 From this appellant now appeals

VII

3

Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

From these Findings of Fact, the Board issues these

| 1    | CONCLUSIONS OF LAW  |
|------|---|
| 2    |   |
| 3    | į<br>Į  |
| 4    | Violation. Since 1975, the Forest Practices Act has provided that.                                |
| 5    | "No ClassIII forest practice shall be   |
| 6    | commenced or continued unless the department [DNR] has approved an application"                   |
| 7    | RCW 76.09 050(2)  |
| 8    |   |
| 9    | The appellant harvested timber in an area of unstable soils and thereby conducted a Class III     |
| 10   | forest practice.  |
| 11   | II  |
| 12   | The DNR shall notify the applicant in writing of its approval of a forest practices               |
| 13   |   |
| 14   | application. RCW 76.09.050 (5). The oral discussion on the ground between the DNR                 |
| 15   | forester and the appellant did not constitute the approval of a forest practices application. The |
| 16   | approval of a forest practices application, like the issuance of a hunting or fishing license, is |
| 1 17 | done in writing, not orally.  |
| 18   | 111   |
| 19   |   |
| 20   | The appellant conducted a Class III forest practice without an approved application in            |
| 21   | violation of RCW 76.09.050 (2).   |
| 22   | IV  |
| 23   | Penalty The penalty, as assessed by DNR, is made applicable to events occurring in                |
| 24   | December, 1993-January, 1994 This is a period of time which straddles the date of                 |
| 25   | Longinos, 1770 valuaty, 177. Time to a portion of time without standards the date of              |
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| 27   | FINAL FINDINGS OF FACT, 4 CONCLUSIONS OF LAW AND ORDER  |

FPAB NO. 94-20

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January 1,1994. The significance of this is that on January 1,1994, by amendment of RCW 76.09.170, the Legislature increased civil penalties applicable to forest practices vilolations. The penalty here was assessed under the new schedule while the events in question occurred during the time both before and after the amendment.

V

The applicable rule in this situation has been stated as follows:

" a staute which creates a new liability or imposes a penalty will not be construed to apply retroactively."

Johnston v. Beneficial Management, 85 Wn.2d 637, 538 P2d 510 (1975).

Therefore, some proration must be made between the old and new penalty schedules to avoid retroactive application of the amended statute.

VI

An approriate proration in this instance would be reached by combing the former base penalty of \$500 (for events in December, 1993) and the new base penalty of \$2000 (for the events in January, 1994), then dividing by 2 to obtain an average. This yields a penalty of \$1250, which we determine to be appropriate in this matter.

| 1  | VII  |
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| 3  | Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such |
| 4  | From the foregoing, the Board issues this                                      |
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| 27 | FINAL FINDINGS OF FACT, 6 CONCLUSIONS OF LAW AND ORDER FPAB NO. 94-20          |

## **ORDER** The violation of conducting forest practices without an approved application is affirmed. The civil penalty is abated to \$1250 DONE at Lacey, Washington, this 10 day of September, 1994 Administrative Appeals Judge FOREST PRACTICES APPEALS BOARD ROBERT E QUOIDBACH, Member F94-20Γ

| 1  |  |     |
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| 2  | BEFORE THE FOREST PRACTICES APPEALS BOARD STATE OF WASHINGTON                        |     |
| 3  |  |     |
| 4  | DAVID A. MACBRYER )  |     |
| 5  | ) FPAB NO 94-20<br>Appellant, )  |     |
| 6  | v. ) FINAL FINDINGS OF FACT,   |     |
| 7  | ) CONCLUSIONS OF LAW   | ,   |
| 8  | STATE OF WASHINGTON, ) AND ORDER DEPARTMENT OF NATURAL )                             |     |
| 9  | RESOURCES )  |     |
| 10 | Respondent, )  |     |
| 11 |  |     |
| 12 | This matter came on before the Honorable William A Harrison, Administrative          |     |
| 13 | Appeals Judge, presiding, and Board Member Robert A Quoidbach.                       |     |
| 14 | The matter is an appeal from a \$2,000 civil penalty for allegedly conducting forest |     |
| 15 | practices without an approved application  |     |
| 16 | Appearances were as follows.   |     |
| 17 | 1. David A MacBryer, representing himself  |     |
| 18 | 2. John E. Justice, Assistant Attorney General, for the Washington State Department  | ent |
| 19 | of Natural Resources   |     |
| 20 | The hearing was conducted at the John A Cherberg Building on September 20, 199       | }4  |
| 21 | Gene Barker & Associates, Olympia, provided court reporting services                 |     |
| 22 | Witnesses were sworn and testified. Exhibits were examined. From testimony hea       | ard |
| 23 | and exhibits examined, the Forest Practices Appeals Board makes these                |     |
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| 27 | FINAL FINDINGS OF FACT, I<br>CONCLUSIONS OF LAW AND ORDER<br>FPAB NO. 94-20          |     |

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## FINDINGS OF FACT

I

This matter arises in Snohomish County Appellant, David A MacBryer, is an experienced logging operator who was engaged by a landowner, Hadley, to harvest timber

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After obtaining a forest practices approval from the Department of Natural Resources (DNR), appellant harvested a considerable area within the Hadley ownership. That done, appellant then submitted another application to DNR for a parcel of 7 acres elsewhere on Hadley land. That application shows the 7 acres to be east and up slope from a creek. The application also proposed a haul road to cross the creek.

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"Disapproved due to incomplete road information. Please supply detailed road location plan with bridge site information."

IV

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From these Findings of Fact, the Board issues these:

| 1  | CONOLUCIONS OF LAW  |
|----|---|
| 2  | CONCLUSIONS OF LAW  |
| 3  | I   |
| 4  | Violation. Since 1975, the Forest Practices Act has provided that.                                |
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| 6  | commenced or continued. unless the department [DNR] has approved an application.                  |
| 7  | RCW 76.09 050(2)  |
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| 18 | III   |
| 19 | The appellant conducted a Class III forest practice without an approved application in            |
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| 21 | violation of RCW 76 09 050 (2)  |
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| 23 | Penalty The penalty, as assessed by DNR, is made applicable to events occurring in                |
| 24 | December, 1993-January, 1994 This is a period of time which straddles the date of                 |
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FPAB NO. 94-20

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| 1  | VII   |
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| 3  | Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such, |
| 4  | From the foregoing, the Board issues this                                       |
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| 27 | FINAL FINDINGS OF FACT, 6 CONCLUSIONS OF LAW AND ORDER                          |

FPAB NO. 94-20

## ORDER The violation of conducting forest practices without an approved application is affirmed. The civil penalty is abated to \$1250. DONE at Lacey, Washington, this 10th day of September, 1994 HONORABLE WILLIAM A HARRISON Administrative Appeals Judge FOREST PRACTICES APPEALS BOARD ROBERT E. QUOIDBACH, Member F94-20F

FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER FPAB NO 94-20